No. 21,840

United States Court of Appeals

For the Ninth Circuit

EDWIN CORDEIRO and EDMUND LEWIS (individually and doing business as CORDEIRO AND LEWIS APPLIANCES),
Appellants,

vs.

AMERICAN HOME ASSURANCE COMPANY (a corporation),
Appellee.

Appeal from the Judgment of the United States District Court, Eastern District of California at Fresno, California
Honorable M. D. Crocker, Judge

APPELLANTS' CLOSING BRIEF

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FOREWORD

We have read with care Appellee's brief and believe that we have touched on all of the legal propositions involved and see no occasion to repeat here what we said in our opening brief.

Because of what we feel are misconceptions on Appellee's part as to the state of the record and the legitimate inferences to be drawn from it, we comment briefly on certain aspects of the case which, we

respectfully submit, require that the judgment be reversed.

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1. APPELLEE'S ARGUMENT IN DEFENSE OF HOFFMAN IGNORES THE FACT THAT MILLER, APPELLEE'S GENERAL AGENT, WAS AWARE THAT THE APPLIANCE LINE, CONSTITUTING THE PRINCIPAL VALUE OF APPELLANTS' STOCK-IN-TRADE AND ALREADY COVERED IN CURRENT INVENTORY REPORTS SUBMITTED TO APPELLEE, WAS BEING MOVED TO THE NEW LOCATION.

Much space is consumed in Appellee's brief in defense of Hoffman.

We need not concern ourselves with the reasons why Hoffman did not perceive the obvious. Although Hoffman was a *special* agent of defendant, Miller was the general agent and the knowledge of Miller was sufficient to impose liability on the defendant under the rules discussed in our opening brief (pp. 16-19).

In this connection Miller testified as follows concerning the acquisition of the new location at 1105 Sixth Street and the meeting concerning insurance on that subject attended by Miller, Hoffman, Cordeiro and Lewis:

> "We discussed the coverage to some degree. It was pointed out that the heavy appliances and the stereos and everything was being moved over to the store and that's what they were doing at the time . . ." (RT 33:11-20)

For reasons not apparent in the record Hoffman, even at a very early date in the proceedings (cf. Defendant's Exhibit E), had either ignored what he saw and was told or was simply inattentive.

But, again, the knowledge of Miller was sufficient to bind the defendant and that is all we seek to do.

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2. APPELLEE'S DEFENSE OF HOFFMAN, BASED ON THE CLAIMED (BUT NON-EXISTENT) INTENT OF PLAINTIFFS TO RETAIN THE APPLIANCE LINE AT THE OLD PREMISES AND THE CLAIMED FAILURE OF PLAINTIFFS TO FURNISH DEFENDANT WITH AN INVENTORY OF THE PROPERTY TO BE COVERED AT THE NEW LOCATION IS WITHOUT MERIT.

The litany that runs through Appellee's brief (pp. 6, 25, 27, 31, 35, 45 and 46) is summarized in the following passage (pp. 46-47):

> "The 'objective' situation at the time of the negotiations between Mr. Cordeiro and Mr. Hoffman was that Mr. Cordeiro was keeping the old store in *status quo* ('as is', he told Mr. Miller) and so advised Mr. Hoffman. 'Objectively', all Mr. Cordeiro wanted, asked for, and got, was insurance on the furniture store."

Appellee claims it was Cordeiro's "announced intention to retain the *status quo* on the old location" (Appellee's brief page 6), that Cordeiro "affirmatively represented that the old appliance store was going to continue to operate 'as is'" (page 25), and that "Cordeiro stated to Mr. Miller he intended to retain that operation 'as is'" (page 27).

Indeed, at page 35 Appellee assigns to Cordeiro an intention "to subsequently move a massive inventory of appliances into the new location" and asks how any insurance company could "divine what future commercial expediency would induce an insured to increase his inventory" (Appellee's brief page 35).

Defendant even suggests that Cordeiro violated "a traditional standard of private morality" (page 45), was guilty of a violation of Section 332 of the Insurance Code and, in effect, of constructive fraud (Appellee's brief pp. 30-31).

This colorful assault on Cordeiro involves a most extraordinary construction of Cordeiro's testimony as to what he told Miller, the defendant's general agent.

We quoted that testimony at page 8 of our opening brief and repeat it here for emphasis:

> "Q. First of all, where did the conversation take place?
>
> "A. At our store when I called Harry. The first time I called Harry we were in the process of buying the store and at that time I talked about the insurance with Mr. Enos that we would have our own and I told Harry that *we were going to buy the furniture store but that we were going to combine the furniture and appliances together and operate the store and that I was to move my office and everything to the furniture store and then we would keep the other store as-is, with giftware, records and housewares business with the two women.* That is the extent of the conversation at that time." (RT 53:2-15)

If Miller's use of the expression "as-is" justifies the *"status quo"* arguments advanced in Appellee's brief, we believe that plain language has lost its meaning.

Nor was there anything equivocal in Cordeiro's statement to Hoffman (RT 56:16-22):

"Q. All right. Did you tell Mr. Hoffman what you were going to leave in the old store, the old location?

"A. I just told him we were going to bring our appliances and run our furniture and appliances together in the new location, that we were just going to keep the inventory, as far as the other was concerned, strictly housewares, small appliances, records and giftware."

Interlaced with Appellee's *"status quo"* argument is its claim that the inventory given it by Cordeiro did not set forth an inventory of the line of appliances which were being moved to the new location.

Defendant's representatives attended the trial of the action and are well aware that the written inventory given by Cordeiro to the defendant during negotiations involving the placing of insurance on property at the new location was an inventory of the furniture purchased by Cordeiro and already located at the new location (RT 54:7-57:5, quoted at pages 9-12 of our opening brief).

The defendant at monthly intervals for more than a year had already been receiving inventories from the plaintiffs of plaintiffs' stock-in-trade, which as the defendant was admittedly aware, consisted primarily of the appliance line. (Rider No. 1 of Plaintiffs' Exhibit 6; testimony of Girdlestone, RT 97:4-98:2; and testimony of Hoffman, RT 134:12-135:4)

The defendant already had that inventory and it would have been idle to have supplied on a separate piece of paper a restatement of that inventory when

the defendant—at least through its agent Miller—was aware that the appliance line was being moved to the new location.

If the defendant desired a single piece of paper listing all the items which were being purchased by Cordeiro in the new store as well as a seriatim description of the appliances which were being moved to the new store, the defendant should have requested such an inventory.

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3. APPELLEE'S BRIEF FAILS TO ANSWER OUR CONTENTION THAT IT WAS PREJUDICIAL ERROR FOR THE COURT TO EXCLUDE PLAINTIFFS' EXHIBIT 9.

Whatever may be said or denied concerning the role of Hoffman in this matter, the fact is that the form of report furnished by the defendant to the plaintiffs only required the plaintiffs to make a "statement of values wherever located".

There was no suggestion in the form (Plaintiffs' Exhibit 5) that a different report should be made with respect to each address where property was located or that the items reported should be segregated according to the place of their location.

We pointed out in our opening brief (page 24) that the Standard Form Bureau form of reporting (Plaintiffs' Exhibit 9 for identification) would immediately have called to the attention of the insured or its employees that the insurer required a segregation of inventory as between the various addresses where the property was located. Had such a form been used the

agent Miller, through whom these reports were submitted, as well as the defendant, would have been put upon immediate notice that the amount of inventory kept at the new location exceeded the claimed limits of liability and the situation would have been corrected long before the fire occurred.

Defendant's only answer to this argument is that "the insurer is totally indifferent to the kind of form which the insured may elect to use" (Appellee's brief page 43).

Indifferent it may be, but the fact is that it furnished the insured with a reporting form which, in view of the numerous representations made by Miller and Hoffman, led the insured to believe that the property was covered "wherever located", particularly in view of Hoffman's assurances to Cordeiro that he was getting "the best possible coverage" (RT 154: 20-24) and "had the same coverage that he had at the first location" (RT 155:2-3).

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4. APPELLEE WHOLLY FAILS TO JUSTIFY OR EXPLAIN HOFFMAN'S FAILURE TO DISCLOSE THE LIMITATION ON HIS AUTHORITY WHICH RENDERED HIM INCAPABLE OF WRITING A POLICY OF SUFFICIENT LIMITS TO PROTECT APPELLANTS.

There is, as we pointed out in our opening brief (pp. 17-18), an affirmative duty on an insurance company "to call specifically to the attention of the policyholder [limitations upon the agent's authority]", as stated in *Raulet v. Northwestern etc. Insurance Co.* (1910) 157 C. 213, 230, quoted with approval in *Tom-*

erlin v. Canadian Indemnity Co. (1964) 61 C.2d 638 at 645.

Why did Hoffman fail to tell Cordeiro of the secret limitation on his authority which purportedly limited that authority to insure property at the new location to an upper limit of only $25,000?

If, instead of telling Cordeiro that Cordeiro was getting "the best possible coverage" and "the same coverage that he had at the first location", he had told Cordeiro he had no authority to insure for any sum in excess of $25,000, and that that sum might be insufficient for Cordeiro's operation, Cordeiro would not have been lulled into the false sense of security which has cost him and his partner a crippling loss.

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5. CONCLUSION.

It is respectfully submitted that the judgment should be reversed and judgment entered for the plaintiffs in the amount of the prayer, or, alternatively, that the matter may be retried in the light of the principles above discussed.

Dated, San Francisco, California,
October 28, 1968.

Respectfully submitted,
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